

BACKGROUND

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2 On March 11, 2008, Plaintiff filed a complaint in the United States District Court, Northern
3 District of California against Defendants J.D. Byrider, Inc., JD Byrider of Chandler, Carnow
4 Acceptance Company, John Anderson, T-Mobile USA, Inc., and Does 1 through 10.¹ The
5 Complaint alleges violations of the [Fair Debt Collection Practices Act 15 U.S.C. § 1692](#), *et seq.*
6 (Hereinafter, “FDCPA”) (first cause of action), California’s Rosenthal Fair Debt Collect Practices
7 Act, [Cal. Civ. Code § 1788](#) *et seq* (Hereinafter, “Rosenthal Act”) (the second cause of action),
8 negligence (third and forth causes of action), and invasion of privacy (fifth cause of action).

9 According to the complaint, Plaintiff purchased a used car from J.D. Byrider and obtained
10 financing from CNAC. She fell behind on her payments in October 2007. J.D. Byrider and CNAC
11 allegedly assigned her debt to Defendant Anderson for collection. On or about January 14, 2008,
12 Anderson allegedly contacted T-Mobile and identified himself as Plaintiff’s father requesting that T-
13 Mobile add him as a user on Plaintiff’s T-Mobile account. Thereafter, Defendant allegedly used
14 information obtained from T-Mobile including Plaintiff’s home address to begin unlawful and
15 harassing collection attempts by frequently calling and text messaging Plaintiff.

16 Specifically, the complaint alleges that on January 16, 2008, through January 22, 2008,
17 Anderson began calling Plaintiff in an attempt to collect the debt. On more than one occasion,
18 Anderson called and/or sent text messages to Plaintiff several times a day in a harassing manner.
19 Plaintiff told Anderson to cease and desist several times. Over the course of these five days,
20 Defendant allegedly sent Plaintiff a total of 17 messages in which he was extremely angry,
21 menacing, and intimidating. These messages included the following:

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23 ¹ In July 2008, the parties stipulated to dismiss defendant Grace Auto, Inc, which was erroneously sued and served
24 as J.D. Byrider of Chandler (Doc. 30). On September 9, 2008, Defendants Byrider Franchising, Inc. (erroneously sued and
25 served as J.D. Byrider, Inc.) and Grace Finance, Inc. d/b/a CNAC (erroneously sued and served as Carnow Acceptance
26 Company) filed a motion to stay the proceedings and compel arbitration. On October 17, 2008, this court issued Findings
27 and Recommendations recommending that the motion to compel arbitration and the motion to stay the proceedings be granted
28 as to these defendants. These Findings and Recommendations were adopted by Chief Judge Anthony W. Ishii on December
17, 2008. T-Mobile USA was dismissed from this case on December 9, 2008 pursuant to a settlement agreement (Docs. 45
and 60).

1 1) On January 16, 2008, Anderson falsely stated he was an attorney hired by the Defendant
2 CNAC and claimed that he was hired to “smooth out” issues between Defendant CNAC and
3 Plaintiff;

4 2) On January 17, 2008, Anderson called Plaintiff and stated that he knew her T-MOBILE
5 bill was being sent to her address in Modesto;

6 3) On January 17, 2008, Plaintiff told Anderson to cease and desist communication and
7 ended the conversation;

8 4) After Plaintiff told Anderson to cease and desist communication he called her back
9 continuously. Plaintiff instructed Anderson to cease, each time to no avail;

10 5) Anderson falsely stated that he would have Plaintiff arrested if she did not let him have the
11 car;

12 6) On January 17, 2008, Anderson sent the following text message to Plaintiff : “Turn the car
13 in or I [sic] send the Sheriff, you [sic] illegally took the car out of state I cant [sic] verify insurance
14 or address.” Received 11:15 am, sender 5000-John;

15 7) On January 17, 2008, Anderson sent the following text message to Plaintiff: “[Y]ou have
16 various bills going to crows landing. I can tell by talking to you you’re smarter than this. So [sic] I
17 guess we’ll see.” Received 11:19 am, sender 5000-John;

18 8) On January 17, 2008, Anderson sent the following test message to Plaintiff: “you [sic]
19 might want to tell your amigo Rudy to get a job, I just faxed maricopa [sic] paperwork to stanislaus
20 sheriff department [sic].” Received 11:35 am, sender 5000-John;

21 9) On January 17, 2008, Anderson sent the following text message to Plaintiff: “I want o
22 make thsi [sic] clear, your money is not what I want. I want the car. If you don’t give it up, get
23 yourself some bail money.” Received 11:37 am , sender 5000-John;

24 10) After Plaintiff received this text message she was in great fear and told the caller to stop
25 calling. She then called the police;

26 11) On January 17, 2008, Anderson sent the following text message to Plaintiff: “Calling
27 [sic] me will not help you. Park the car [sic] tell Rudy to warm up the Impala.” Received 11:39 am,
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1 sender 5000-John;

2 12) On January 17, 2008, Anderson sent the following text message to Plaintiff: “[I]t upsets
3 me a smart girl like you is iwith [sic] a guy is [sic] doing nothing at 11:30 a.m. but when he doesn’t
4 have a free car he’ll leave.” Received 11:43 am sender 5000-John;

5 13) On January 17, 2008, Anderson sent the following text message to Plaintiff: “[M]ake
6 sure and have the [sic] deputy call me, nad [sic] show him your DL too.” Received 12:03 p.m.
7 sender 5000;

8 14) After Plaintiff received this text message the deputy sheriff arrived at her house. The
9 deputy sheriff called Anderson leaving a voice mail message ordering Anderson to stop contacting
10 Plaintiff;

11 15) On or about January 17, 2008, Plaintiff called CNAC and spoke to Rose and explained
12 that she felt harassed and intimidated and requested that Anderson cease and desist;

13 16) On January 18, 2008, Anderson called Plaintiff four times. In three of those
14 conversations, Plaintiff instructed Anderson to cease and desist and stated that she would have to
15 call the police again;

16 17) On January 18, 2008, Anderson sent the following text message to Plaintiff: “[D]oes mr.
17 bogens[sic] know you have no DL, no insurance, and no registartion [sic] yet your [sic] on the road
18 doing work.” Received 1:38 p.m. sender 5000-John;

19 18) On January 18, 2008, Anderson placed an unanswered call to Lawrence Borgens,
20 Plaintiff’s employer;

21 19) On January 19, 2008, Anderson sent the following text message to Plaintiff : “Lawrence
22 Borgens will see me first thing Monday, you should not have been rude to my employee.” Received
23 12:25 pm, sender 5000-R&J Recovery;

24 20) On January 19, 2008, Anderson sent the following text message to Plaintiff: “[W]hat
25 makes you think you can drive a car you don’t pay for? My company tows for the local police and
26 sheriff both.” Received 12:27 pm, sender 5000-R&J Recovery;

27 21) On January 19, 2008, Anderson sent the following text message to Plaintiff:
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1 “[A]pparently you think you’re above the law. I don’t want[sic] any trouble. [W]e’re just doing our
2 job.” Received 12:29 pm, sender 5000-R&J Recovery;

3 22) On January 19, 2008, Anderson sent the following text message to Plaintiff: “[T]he guy
4 in [G]eorgia has been removed from the case. Now its my entire staff versus you.” Received 12:32
5 pm, Sender 5000-R&J Recovery;

6 23) On January 19, 2008, Anderson sent the following text message to Plaintiff: “[T]hat lady
7 you were rude to means a lot to me I think an apology is in order.” Received 12:33 pm, Sender-R &
8 J Recovery;

9 24) On January 19, 2008, Plaintiff spoke to an employee at R & J Recovery and he indicated
10 that they had not sent any text messages to the Plaintiff;

11 25) On January 20, 2008, Anderson sent the following text message to Plaintiff: “[I]’m
12 hoping to God you see the light and figure out I will just take your car.” Received 5:49 pm, Sender
13 5000- R & J Recovery;

14 26) On January 20, 2008, Anderson sent the following message to Plaintiff : “Porky Pig 200
15 pound slob in a double wide. Figure. I got some picture messages of you today. Oink oink. Ryan
16 must like mountain climbing.” Received 5:57 pm, Sender 5000;

17 27) On January 22, 2008, Plaintiff called Anderson and told him to stop calling. In response,
18 Anderson stated, “I don’t have to stop it’s my job”;

19 28) On or about January 22, 2008, Plaintiff called CNAC and spoke to Rose who stated that
20 CNAC hired Anderson and that she will get Anderson to cease and desist.

21 As a result of the above, Plaintiff alleges she was forced to provide personal information to
22 her employer and friends so they would not reveal private information, as well as to ensure the
23 safety of those involved. Declaration of Jessica Hartung dated March 24, 2009 at pg. 5. (Doc. 74).
24 Plaintiff subsequently voluntarily surrendered the car. Id. In addition, Plaintiff contends that she
25 suffered tenseness, headaches, nervousness, fear, worry, unhappiness, loss of sleep, nightmares,
26 crying jags, loss of appetite, loss of concentration, loss of enjoyment of life, shortness of breath,
27 humiliation, and extreme emotional distress. Id. Moreover, Plaintiff alleges that Defendant’s actions
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1 aggravated her anxiety disorder, post-traumatic stress disorder, back injury, and asthma which
2 forced her to obtain medication from her psychiatrist. [Id.](#)

3 Defendant was served with a copy of the complaint on April 9, 2008. (Doc. 8). Defendant
4 failed to respond to the complaint or otherwise appear in this action. On September 30, 2008,
5 Plaintiff requested entry of default against Defendant. (Doc 49). The Clerk of the Court entered
6 Defendant's default on October 1, 2008. (Doc. 50). On November 14, 2008, Plaintiff filed a Motion
7 for Default Judgment against John Anderson, aka, John Edens. (Doc. 58). The matter was set for a
8 damages hearing, however, the Court became aware that Defendant may not have been properly
9 served with the complaint and issued an order on January 14, 2009, informing Plaintiff of the
10 difficulties with the proof of service. (Doc. 65). On January 21, 2009, Defendant subsequently
11 moved to withdraw the Motion for Default. (Doc. 66). The court granted Plaintiff's Motion to
12 Withdraw the Motion for Default Judgment and vacated the default issued on October 1, 2008.
13 (Doc. 68).

14 Plaintiff subsequently served Defendant with the summons, complaint, and statement of
15 damages on January 29, 2009. (Doc. 69). The Defendant failed to appear in this action again and
16 default was entered by the Clerk of the Court against him on March 16, 2009. (Doc. 71). Plaintiff
17 filed the instant Amended Motion for Default Judgment on March 23, 2009. (Doc. 72). Defendant
18 John Anderson is named in the first, second, and fifth causes of action of the complaint for violations
19 of the of the FDCPA, the Rosenthal Act, and for Invasion of Privacy, respectively. Based on these
20 violations, Plaintiff seeks a total award of \$58,929.00. More specifically, Plaintiff seeks the
21 following relief:

- 22 1. \$50,000.00 in emotional damages;
- 23 2. \$2,000.00 in statutory damages;
- 24 3. Attorneys' fees in the amount of \$6,579.00; and
- 25 5. Costs in the amount of \$350.

26 **DISCUSSION**

27 Plaintiff moves for entry of default judgment pursuant to [Federal Rule of Civil Procedure](#)

1 [55\(b\)\(2\)](#), which provides that judgment may be entered:

2 (2) By the Court. In all other cases, the party must apply to the court for default
3 judgment. A default judgment may be entered against an infant or incompetent
4 person only if represented by a general guardian, committee, conservator, or other
5 like fiduciary who has appeared. If the party against whom default judgment is sought
6 has appeared personally or by a representative, that party or its representative must be
7 served with written notice of the application at least 3 days before the hearing. The
8 court may conduct hearings or make referrals - preserving any federal statutory right
9 to a jury trial - when, to enter or effectuate judgment, it needs to : (A) conduct an
10 account; (B) determine the amount of damages; (C) establish the truth of any
11 allegation by evidence; or (D) investigate any other matter.

12 Upon default, the well-pleaded allegations of the complaint relating to liability are taken as
13 true. [Dundee Cement Co. v. Highway Pipe & Concrete Products, Inc. 722 F.2d 1319, 1323 \(7th](#)
14 [Cir. 1983\)](#); [TeleVideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917-918 \(9th Cir. 1987\)](#). Thus,
15 “[a]t the time of entry of default, the facts alleged by the plaintiff in the complaint are deemed
16 admitted.” 10 J. Moore, [Moore's Federal Practice](#) §55.11 (3d ed. 2000). While the allegations
17 related to liability are true, the amount of damages suffered are ordinary not. [Dundee Cement Co. v.](#)
18 [Highway Pipe & Concrete Products, Inc. 722 F.2d at 1323](#). However, a judgment by default may be
19 entered without a hearing on damages if the amount claimed is liquidated or capable of
20 ascertainment from definite figures contained in the documentary evidence or in detailed affidavits.
21 [Id.](#) In this case, Plaintiff is seeking a considerable amount in emotional distress damages which is
22 not capable of being ascertained from the declaration submitted. Accordingly, the Court held a
23 damages hearing on May 15, 2009.

19 A. Plaintiff is Entitled to Entry of Default Judgment

20 Factors which may be considered by courts in exercising discretion regarding the entry of a
21 default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's
22 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action;
23 (5) the possibility of a dispute concerning material facts; (6) whether the default was due to
24 excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure
25 favoring decisions on the merits. [Eitel v. McCool, 782 F.2d 1470, 1471-1472 \(9th Cir. 1986\)](#).

26 The Court has evaluated the factors listed above and finds that the facts in this case weigh
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1 heavily in favor of granting default judgment. First, Plaintiff would suffer prejudice if the court does
2 not enter default judgment because she would have no other means of recovery. Second, as outlined
3 below, Plaintiff's complaint properly alleges the necessary elements of each cause of action which
4 satisfies the second and third factors; the merits of the substantive claim, and the sufficiency of the
5 complaint. The fourth factor is also met since there is a significant amount of money at stake in this
6 action in the form of actual damages, which as discussed below, are authorized under law.

7 The fifth factor, the possibility of a dispute concerning the material facts is also met.
8 Defendant never appeared in this action. Therefore, Defendant is not in a position to defend the
9 action, or to dispute material facts. Given Defendant's non-appearance, the sixth factor is also
10 satisfied since there is also no evidence that default resulted from excusable neglect. With regard to
11 the last factor, although cases should be decided on the merits when reasonably possible, such
12 preference alone is not dispositive. [PepsiCo Inc., v. California Security Cans, 238 F. Supp. 2d 1172,](#)
13 [1177 \(C.D. Cal. 2002\)](#). Defendant's failure to respond and defend this action, renders a decision on
14 the merits impractical. Finally, Defendant does not appear to be an infant or incompetent person,
15 and is not in the military service or otherwise exempted under the War and National Defense
16 Servicemember's Civil Relief Act.

17 B. Sufficiency of the Complaint and Damages

18 **1. The FDCPA**

19 The FDCPA was enacted in response to inadequate laws to redress injuries to consumers
20 from abusive, deceptive, and unfair debt collection practices by debt collectors. [15 U.S.C. § 1692](#).
21 The FDCPA broadly prohibits: (1) unfair or unconscionable collection methods, (2) conduct which
22 harasses, oppresses, or abuses any debtor, and (3) any false, deceptive, or misleading statements in
23 connection with the collection of a [debt. 15 U.S.C. § 1692d-f](#). To bring a valid FDCPA action, the
24 defendant must be a "debt collector" and the plaintiff must be a "consumer" within meaning of
25 [FDCPA. 15 U.S.C.A. § 1692a](#). The FDCPA creates a private right of action against a debt collector.
26 [15 U.S.C. § 1692k](#).

27 Anderson is a debt collector and Hartung is a consumer under the FDCPA. Beginning on
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1 January 16, 2008, Defendant unlawfully obtained Plaintiff's contact information from a third party.
2 Thereafter, he sent a series of harassing messages and used continuous abusive tactics to collect a
3 debt including misrepresenting that he was an attorney, threatening to contact Plaintiff's employer,
4 and making a phone call to Plaintiff's employer. Furthermore, Defendant Anderson told Plaintiff that
5 he would have her arrested if she did not pay the debt or return the car, called her names, told
6 Plaintiff he had taken pictures of her, and made inappropriate sexual comments.

7 Based on the allegations in complaint, Anderson's actions violate the following sections of
8 the [FDCPA: 15 U.S.C. § 1692c](#) (b) (prohibits the improper use of third party contacts); [15 U.S.C. §](#)
9 [1692d](#) (prohibits harassment or abuse); [15 U.S.C. § 1962d](#) (2) (prohibits profane language and/or
10 other abusive language); [15 U.S.C. § 1692d](#) (5) (prohibits repeated telephone calls); [15 U.S.C. §](#)
11 [1692e](#) (prohibits false representations); [15 U.S.C. § 1692e](#) (2)(A) (prohibits false impression of legal
12 status of debt); [15 U.S.C. § 1692e](#) (3) (prohibits false impression that an individual is an attorney);
13 [15 U.S.C. § 1692e](#) (4) (prohibits false impression that nonpayment will result in arrest); [15 U.S.C. §](#)
14 [1692e](#) (5) (prohibits threat to take action that cannot be legally taken); [15 U.S.C. § 1692e](#) (7)
15 (prohibits giving a consumer the impression that they have committed a crime) [15 U.S.C. § 1692e](#)
16 (10) (generally prohibits false representations and deceptive means); [15 U.S.C. § 1692f](#) (prohibits
17 unfair and unconscionable means to collect a debt); and [15 U.S.C. § 1692f](#) (6) (prohibits threats to
18 unlawfully disable Plaintiff's property).

19 *a. Actual Damages based on the FDCPA*

20 Plaintiff requests actual damages in the amount of \$50,000. Under the FDPCA actual
21 damages may be awarded to a Plaintiff as a result of a defendant's failure to comply with the Act.
22 [15 U.S.C. § 1692k\(a\)\(1\)](#). However how to interpret the "actual damage" language with respect to
23 emotional distress is a controversial issue that has not yet been addressed by the Ninth Circuit.
24 [Bolton v. Pentagroup Financial Services, LLC., 2009 WL 734038 at *10-11 \(E.D. Cal., Mar 17,](#)
25 [2009\)](#); [Costa v. National Action Financial Services, 2007 WL 4526510 at *7-8 \(E.D. Cal., December](#)
26 [19, 2007\)](#). District courts nationally have issued conflicting decisions regarding this issue. Some
27 courts have determined that under the FDPCA a Plaintiff is not required to meet the state law
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1 standards for intentional infliction on emotional distress (“IIED”). [Costa v. National Action](#)
2 [Financial Services, 2007 WL 4526510](#) at *7-8. Courts that do not require state law requirements
3 have analogized the FDCPA to the Fair Credit Reporting Act. (“FCRA”). [Id.](#) citing, [Panahiasal v.](#)
4 [Gurney, 2007 WL 738642 at *2 \(N.D. Cal. March 8, 2007\)](#); [Donahue v. NFS, Inc., 781 F. Supp. 188](#)
5 [\(W.D.N.Y. 1991\)](#) (“A plaintiff’s right to recovery of actual damages under the FDCPA predicated on
6 claimed emotional distress remains independent of the plaintiff’s right, if any, to recover for
7 emotional distress under state law”); [see also Clodfelter v. United Processing, Inc., 2008 WL](#)
8 [4225557 \(C.D. Ill. Sept. 12, 2008\)](#).

9 Alternatively, other courts, including two in this district, require a plaintiff to prove a claim
10 for IIED under state law in order to collect damages for emotional distress. [Bolton v. Pentagroup](#)
11 [Financial Services, LLC., 2009 WL 734038](#) at *10-11 (Plaintiff’s transitory stress failed to meet
12 state IIED standard); [Costa v. National Action Financial Services, 2007 WL 4526510](#) at *7-8
13 (same); [See also Pflueger v. Auto Finance Group, Inc., 1999 WL 33738434 at *4 \(C.D. Cal., 1999\)](#);
14 [cf. Carrigan v. Central Adjustment Bureau, Inc., 502 F. Supp. 468, 470-471 \(N.D. Ga. 1980\)](#)
15 (holding Plaintiff’s FDCPA’s claim for intentional infliction of mental distress met state
16 requirements under Florida tort law); [Venes v. Professional Service Bureau, Inc., 353 N.W. 2d 671,](#)
17 [674-675 \(Minn. Ct. App. 1984\)](#) (finding Plaintiff satisfied state elements of IIED and could thus
18 recover emotional distress damages).

19 Consistent with the decisions issued in this district and the approach adopted by Chief Judge
20 Ishii, the Court will apply the California IIED standard. [See, Bolton v. Pentagroup Financial](#)
21 [Services, LLC., 2009 WL 734038](#) at *10-11. Under California law, to prove a claim for IIED, a
22 plaintiff must show: (1) extreme and outrageous conduct by the defendant; (2) extreme or severe
23 emotional distress to the plaintiff; and (3) actual and proximate causation between the two. [Spinks](#)
24 [v. Equity Residential Briarwood Apartments, 171 Cal.App.4th 1004, 1045, Cal. App 6 Dist. \(2009\)](#)
25 citing [Firestone Tire & Rubber Co., 6 Cal.4th 965, 1001, 25 Cal. Rptr. 2d 550 \(1993\)](#). To be
26 outrageous, the defendant's conduct must be either intentional or reckless, and it must be so extreme
27 as to exceed all bounds of decency in a civilized community. [Id.](#) “Behavior may be considered
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1 outrageous if a defendant : (1) abuses a relation or position which gives him power to damage the
2 plaintiff's interest; 2) know the plaintiff is susceptible to injuries through mental distress, or 3) acts
3 intentionally or unreasonably with the recognition that the actions are likely to result in illness
4 through mental distress.” [Kiseskey v. Carpenters' Trust for So. California, 144 Cal. App. 3d 222,](#)
5 [230, 192 Cal Rptr. 492 Cal. App. 2 Dist. \(1983\).](#) Courts have long recognized in collection cases
6 that the very nature of collection efforts often cause a debtor to suffer emotional distress. [Bundren](#)
7 [v. Superior Court, 145 Cal. App. 3d 784, 193 Cal. Rptr 671 \(1983\); Bowden v. Spiegel, 96 Cal. App.](#)
8 [2d 793, 789 \(1950\).](#) To be actionable as an IIED claim, the conduct must go beyond “all reasonable
9 bounds of decency.” [Bundren v. Superior Court, 145 Cal. App. 3d at 789.](#)

10 When considering whether a Plaintiff has suffered severe emotional distress, courts have
11 noted that “complete emotional tranquility is seldom attainable in this world, and some degree of
12 transient and trivial emotional distress is a part of the price of living among people. The law
13 intervenes only where the distress inflicted is so severe that no reasonable man could be expected to
14 endure it. The intensity and duration of the distress are factors to be considered in determining its
15 severity. It appears therefore, that in this context, severe emotional distress means, emotional
16 distress of such substantial quantity or enduring quality that no reasonable man in a civilized society
17 should be expected to endure it.” [Fletcher v. Western National Life Ins. Co., 10 Cal.App.3d 376,](#)
18 [397, 89 Cal.Rptr. 78, Cal.App.4th Dist. \(1970\).](#) Such injury may include all highly mental reactions
19 such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment,
20 worry and nausea. [Golden v. Dungan 20 Cal. App.3d 295, 311, 97 Cal. Rptr. 577 \(1971\); Fletcher v.](#)
21 [Western Life Ins., Co., 10 Cal. App. 3d at 397.](#)

22 There is no requirement under California law that a Plaintiff provide corroborating evidence
23 in order to establish a claim for emotional distress.² However, a damages award cannot be based

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25 ² In other circuits involving violations of the FDCPA, when courts have not required a Plaintiff to meet the more
26 stringent state IIED requirements, a plaintiff alleging intangible loss must set forth evidence with specificity including
27 corroborating testimony or medical or psychological evidence in support of the damage award. [Cousins v. Trans Union Co.,](#)
28 [246 F. 3d 359, 371 \(5th Cir. 2001\).](#) Unsupported self-serving testimony by a plaintiff is not sufficient. [Wantz v. Experian Info.](#)
[Systems, 386 F. 3d 829, 834 \(7th Cir. 2004\),](#) abrogated on other grounds in [Safeco Ins. Co. of America v. Burr, 551 U.S. 47](#)

1 solely on conjecture or speculation. There must be competent proof of emotional distress suffered by
2 the Plaintiff. [Austero v. Washington National Ins. Co.](#) 132 Cal.App.3d 408, 417, 182 Cal.Rptr. 919,
3 [\(1982\)](#) disapproved on another ground in [Brandt v. Superior Court](#), 37 Cal.3d 813, 816-817, 210
4 [Cal.Rptr. 211, 693 P.2d 796. \(1985\)](#). Testimony of the plaintiff alone will suffice. [Tan Jay](#)
5 [International, Ltd. v. Canadian Indemnity Co.](#) 198 Cal.App.3d 695, 708, 243 Cal.Rptr. 907 (1988);
6 see also, [Young v. Bank of America National Trust & Savings Assoc.](#), 141 Cal. App. 3d 108, 190
7 [Cal. Rptr., 122 \(1983\)](#) (Plaintiff's testimony that she experienced embarrassment, shame,
8 helplessness, nervousness, headaches, insomnia, and frustration because of bank's failure to adjust
9 her credit card was sufficient evidence warranting jury instruction on emotional distress damages).³

10 *b. Summary Plaintiff's Testimony*

11 At the hearing on May 15, 2009, Plaintiff testified that she had been diagnosed with post-
12 traumatic stress disorder and generalized anxiety disorder following her service in the United States
13 Air Force in April 2005. At the time of the incident alleged in the complaint, she was under a
14 psychiatrist's care for the above conditions and also had history of migraine headaches. Prior to this
15 incident, she would suffer panic attacks in which she experienced bouts of extreme panic, crying and
16 anxiety induced asthma attacks which resulted in difficulty breathing. She had been prescribed
17 Prozac, Valium and Albuterol to control these conditions at the time she was contacted by Defendant
18 John Anderson. Additionally, she was prescribed Pergaset to treat her migraine headaches. While
19 she was taking the Prozac daily, the Valium, Albuterol, and Pergaset, was only prescribed on an as

20 _____
21 [\(2007\)](#).

22 ³ While the Ninth Circuit has not specifically ruled on whether corroborating testimony or other evidence is
23 necessary to establish emotional distress damages pursuant to FDCPA, the court has held that emotional distress damages
24 generally may be proven in a number of ways, including through corroborating medical evidence or non-expert testimony
25 establishing "manifestations of mental anguish [and the occurrence of] significant emotional harm. [Dawson v. Wash. Mut.](#)
26 [Bank., F.A. 390 F. 3d 1139, 1149-50 \(9th Cir. 2004\)](#) (finding that damages for emotional distress are available under
27 bankruptcy law when a creditor violates the automatic stay that follows from the filing of a bankruptcy petition.). Emotional
28 distress damages can also be readily apparent without corroborative evidence where a plaintiff was a victim of egregious
conduct or where the "circumstances make it obvious that a reasonable person would suffer significant emotional harm. [Id.](#)
at 1150; See also, [Zhang v. American Gem Seafoods](#), 339 F. 3d 1020, 1040 (9th Cir. 2003) (upholding emotional distress
damages based only on testimony.); [Fausto v. Credigy Services Corp., et al.](#), 598 F. Supp. 1049 (N.D. Cal., Feb. 17, 2009).

1 needed basis which she had not used regularly prior to this incident.

2 After Defendant contacted Plaintiff, Plaintiff began experiencing severe panic attacks which
3 resulted in uncontrollable crying throughout the day, insomnia, headaches, lack of energy, a loss of
4 appetite and difficulty breathing. She needed to take Valium tablets twice a day to calm her down,
5 as well as use her Albuterol inhaler more frequently. She also increased her use of Pergaset to
6 manage her migraine headaches, as well as over the counter medications to help her sleep.

7 Over the course of the five day period, Plaintiff contacted her psychiatrist because she was
8 afraid she would run out of the Valium. She made an appointment to see her psychiatrist as a result
9 of Defendant's contact. Plaintiff was particularly troubled when she learned that an unauthorized
10 user had been added to her T-Mobile account and contacted the police to report a false identity
11 claim. Moreover, the fact that Defendant was sending her messages about close friends and knew
12 specific personal information about them caused her considerable stress. Finally, Plaintiff was very
13 scared when she received a text message from Defendant indicating that he had taken pictures of her
14 late one evening. This was particularly disturbing because she lives in a rural area, she was home
15 alone, and did not know whether Defendant was outside her house.

16 Prior to the contact with Defendant, Plaintiff believed that her condition was getting better.
17 However, when she received the text messages from Defendant she "snapped" and did not know
18 what to do. On a scale of 1 to 10 Plaintiff reported that her stress level was the highest it could be.
19 She believes that this incident set her treatment back and resulted in an aggravation of her pre-
20 existing condition. The aggravated symptoms lasted for approximately eight to nine months after
21 Plaintiff surrendered the car. Plaintiff has only recently returned to her level of functioning prior to
22 this incident.

23 *c. Amount of Actual Damages Under the FDCPA*

24 Based on Plaintiff's testimony, the Court finds that she has met the state requirements of an
25 IIED claim as Defendant's conduct goes beyond all reasonable bounds of decency. Defendant
26 engaged in extreme and outrageous conduct including abusing his position of authority as a debt
27 collector to harass, lie and intimidate Plaintiff. He contacting her repeatedly, took pictures of her,
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1 obtained personal information about her and her friends, and fraudulently added himself to
2 Plaintiff's T-Mobile account. It is clear that given the nature and the duration of distress
3 experienced by Plaintiff that she suffered severe emotional distress as a result of Defendant's
4 actions. The severity of her distress is evidenced by her need to take additional prescribed and over
5 the counter medications, as well as the need to consult her psychiatrist about the incident. She
6 experienced panic attacks which exacerbated her asthma, suffered from increased migraine
7 headaches, had difficulty sleeping, and would cry uncontrollably. This incident set Plaintiff's
8 treatment for post-traumatic stress and anxiety disorders back and it has taken Plaintiff several
9 months to return to her prior level of functioning. The distress Plaintiff experienced exceeds that
10 which any reasonable person in a civilized society should endure.

11 The remaining issue is the amount of actual damages that should awarded in this case.
12 Plaintiff has not provided the Court with any state IIED cases defining an appropriate damages
13 award.⁴ Plaintiff has, however, cited [Panahiasal v. Gurney, 2007 WL 738642](#) in support of her
14 request for \$50,000 in actual damages. [Panahiasal v. Gurney](#) was a case involving two plaintiffs
15 based on violations of the FDCPA. One plaintiff was awarded \$50,000 in emotional damages based
16 on abusive debt collection practices which included repeated telephone abuse resulting in
17 embarrassment, fear, anger, panic, humiliation, nervousness, crying fits, difficulty eating and
18 sleeping, and diarrhea. [Panahiasal v. Gurney, 2007 WL 738642](#) at *2. However, the other plaintiff
19 in [Panahiasal v. Gurney](#) was only awarded \$10,000 after suffering from embarrassment, humiliation,
20 harassment, anger, anxiety, lack of concentration, and stress. [Id.](#) Plaintiff has also cited [Clodfelter v.](#)
21 [United Processing, Inc., 2008 WL 4225557 \(C.D. Ill. Sept. 12, 2008\)](#) in which a motion for default
22 judgment against a debt collector was granted awarding \$351,000 in damages including \$100,000 in
23 actual damages. This case involved a debt collection company with a long history of using abusive
24 tactics that called Plaintiff, his family members, and Plaintiff's employer, as well as threatening
25 criminal prosecution for failure to pay a \$400 debt.

26 ⁴ The Court was unable to locate any California cases identifying the amounts of emotional distress damages
27 awarded in IIED cases involving debt collection actions.

1 An examination of the cases applying the federal FDPCA standard reveals that the cases
2 cited by Plaintiff are on the high end of the damages award spectrum as most district courts have
3 awarded between \$1,000 and \$5,000. See, [Baruch v. Healthcare Receivable Management, Inc.,](#)
4 [2007 WL 3232090 \(E.D.N.Y. 2007\)](#) (\$5,000 awarded when consumer received numerous
5 threatening telephone calls and letters and as a result lost sleep, became depressed and suffered heart
6 problems); [Cooper v. Ellis Crosby & Assoc., Inc., 2007 WL 1322380 \(D. Conn. 2003\)](#) (\$3,000
7 emotional distress damages when debt collector misrepresented he was an investigator from the
8 bank, threatened to call Plaintiff's boss and to subpoena Plaintiff's hard drive on her computer);
9 [Gervais v. O'Connell, Harris & Assoc., Inc., 297 F. Supp.2d 435 \(D. Conn. 2003\)](#) (\$1,500 emotional
10 damages awarded when defendant withdrew \$2,500 from debtor's bank account and Plaintiff did not
11 seek medical attention but was taking anxiety medication for condition unrelated to Defendant's
12 actions); [Chiverton v. Fed. Finance Group Inc., 399 F. Supp. 2d 96 \(D. Conn. 2005\)](#) (Damages of
13 \$5,000 awarded for consumer's emotional distress under the FDCPA for debt collection practices
14 that lasted over a period of several months which included repeated phone calls to consumer's
15 workplace, leading consumer to fear losing his job, as well as directly contacting consumer's
16 supervisor); [Teng v. Metropolitan Retail Assoc., 851 F. Supp. 61 \(E.D.N.Y. 1994 \)](#) (\$1,000 awarded
17 when debt collector who called plaintiff's place of employment several times and obtained the phone
18 number of plaintiff's supervisor, and identified himself as a city marshal threatening to take away
19 plaintiff's furniture). One jury award of \$85,000 in emotional distress damages due to debt
20 collections agency's violation of FDCPA was upheld when violations of the FDCPA had occurred
21 over several months. [Nelson v. Equifax Services, LLC, 522 F. Supp. 2d 1222, 1239 \(C.D. Cal.](#)
22 [2007\)](#).

23 Here, Defendant's actions were egregious. The Court is also mindful that Plaintiff had
24 existing emotional conditions that were exacerbated by Defendant's conduct resulting in her need to
25 see a psychiatrist and obtain medication. However, even after considering all of these factors,
26 Plaintiff's request for \$50,000 appears to be excessive given that Plaintiff was exposed to
27 Defendant's actions for a limited period of time. The Court has considered Plaintiff's declaration
28

1 and testimony, as well as the awards given in similar cases. Accordingly, the Court recommends
2 that Plaintiff be awarded \$25,000 in actual damages.

3 *d. Amount of Statutory Damages Under the FDCPA*

4 Under the FDCPA, plaintiffs are entitled to statutory damages up to \$1,000 pursuant to [15](#)
5 [U.S.C. § 1692\(a\)\(2\)\(A\)](#). A court shall consider among other factors, “the frequency and persistence
6 of the noncompliance, and the extent to which the noncompliance was not intentional.” [15 U.S. C. §](#)
7 [1692k\(b\)\(1\)](#). The Court has concluded that based on the unanswered allegations in the complaint
8 and the nature of the allegations, Defendant’s actions were intentional. Plaintiff is entitled to
9 \$1,000 in statutory damages under this provision.

10 **2. The Rosenthal Act**

11 The Rosenthal Act requires an intent that is knowing and willing. Based on the unanswered
12 allegations in the complaint and the nature of the allegations, Defendant’s actions were intentional.
13 Moreover, [California Civil Code § 1788.17](#) states that every violation of the FDCPA is ipso facto
14 violation of the Rosenthal Act. Pursuant to [Cal. Civ. Code § 1788.30\(b\)](#), Plaintiff is entitled to
15 \$1,000 statutory damage award based on this violation.

16 **3. Invasion of Privacy**

17 In order to recover for the tort of invasion of privacy (intrusion upon seclusion), Plaintiff
18 must prove the following elements : (1) an intentional intrusion (physical or otherwise); 2) on the
19 solitude or seclusion of another; (3) that would be highly offensive to a reasonable person.
20 [Panahiasal v. Gurney, 2007 WL 738642](#) at *2 citing [Kuhn v. Account Control Technology, 865 F.](#)
21 [Supp. 1443 \(D. Nev. 1994\)](#). Moreover, “improper conduct in knowingly and intentionally pursuing
22 a person to force payment of a debt, whether or not he owes it, may under some circumstances, give
23 rise to a right to damages for an invasion of privacy.” [Panahiasal v. Gurney, 2007 WL 738642](#) at *2
24 quoting [Montgomery Ward v. Larragoite, 467 Pd. 399, 401 \(Supreme Court of New Mexico 1970\)](#).
25 A number of courts have held that repeated and continuous calls in an attempt to collect a debt give
26 rise to a claim for intrusion upon seclusion. [Joseph v. J.J. Mac Intyre Companies, 281 F. Supp. 2d](#)
27 [1156, 1169 \(N.D. Ca. 2002\)](#), citing, [Shulman v. Group W. Prod. Inc., 18 Cal. 4th 200 \(1998\)](#); See

1 also, [Lowe v. Surpas Resource Corp. et al., 253 F. Supp. 2d 1209 \(D. Kan. 2003\)](#).

2 Plaintiff has not requested an award for any damages for this cause of action. Furthermore,
3 while Defendant's abusive conduct meets all elements of this tort, Plaintiff has already been
4 awarded damages for emotional distress under the FDCPA. The Court will not recommend
5 additional damages be awarded based on this cause of action.

6 **4. Attorney's Fees**

7 The FDCPA and the Rosenthal Act specifically authorize an award of attorney's fees to a
8 prevailing plaintiff. [15 U.S.C. § 1692k\(a\)\(3\)](#) & [Cal. Civil Code. § 1788.30](#) (c). The Court
9 determines an attorney fee award by calculating the "lodestar figure" which entails taking the
10 numbers of hours reasonably expended on the litigation and multiplying it by a reasonable hourly
11 rate. [Hensley v. Eckerhart, 461 U.S. 424, 433 \(1983\)](#); [Ferland v. Conrad Credit Corp., 244 F. 3d](#)
12 [1145 \(9th Cir. 2001\)](#) (In a FDCPA case, district court must calculate awards for attorney's fees using
13 "lodestar" method"). However, the court may enhance or reduce the lodstar figure. [Fischer v. SJB-](#)
14 [P.D., Inc., 214 F. 3d 1115 \(9th Cir. 2004\)](#). Additionally, "[a] court is justified in relying on a
15 requesting counsel's recently awarded fees when setting that counsel's reasonable hourly rate."
16 [Lowe v. Elite Recovery Solutions, 2008 WL 324777 at *5 \(E.D. Cal. Feb. 5, 2008\)](#) quoting [Abad v.](#)
17 [Williams, Cohen & Gray, Inc., 2007 WL 1839914 at *4 \(N.D. Cal. 2007\)](#).

18 In the first Motion for Default Judgment, counsel requested \$12,240.00 in attorney's fees
19 which included fees for work done on this case related to other defendants. Plaintiff was ordered to
20 file a brief justifying this amount. Plaintiff's counsel has requested \$6,579.00 in the current motion
21 and requests fees which apply only to this defendant. He has indicated that hourly billing rate is
22 \$295 an hour. However, two courts, including one in this district, reduced this counsel's billing rate
23 to \$250 an hour. [Lowe v. Elite Recovery Solutions, 2008 WL 324777 at *5 \(E.D. Cal. Feb. 5,](#)
24 [2008\)](#); [Scheuneman v. 1st Credit of America, 2007 WL 1969708 \(N.D. Cal. 2007\)](#). Counsel's rate
25 was also reduced to \$275 an hour in [Civitello v. 1st Credit of America](#), Northern District of
26 California, Case No. CO5-04944.

27 The Court finds that \$250.00 per hour is a reasonable billing rate in this case. A review of
28

1 the documents submitted by counsel in support of his request for attorney's fees indicates that he has
2 spent hours 22.1 hours on this case which totals \$5,525.00 when the \$250 per hour rate is applied.
3 There was also an additional 3.8 hours billed for legal services provided at a rate of \$115.00 per hour
4 amounting to \$437.00. The Court will also recommend that this request be granted. Accordingly,
5 the Court will recommend that Plaintiff's counsel be awarded at total of \$5,962.00 in attorney's
6 fees. The request for \$350.00 for other costs is also reasonable.

7 **RECOMMENDATION**

8 For the reasons discussed above, the Court RECOMMENDS that Plaintiff's Amended
9 Motion for Default Judgment in favor of Plaintiff and against Defendant John Anderson, aka John
10 Edens, be GRANTED IN PART and DENIED IN PART for a total award amount of \$ 33,312.00 to
11 be broken down as follows ;

- 12 2. Plaintiff be AWARDED actual damages in the amount of \$25,000;
- 13 3. Plaintiff be awarded a total of \$2,000.00 in statutory damages including \$1,000 under
14 the Rosenthal Act and \$1,000 under the FDCPA respectively;
- 15 4. Attorneys' fees be awarded in the amount of \$5,962.00; and
- 16 5. Costs in the amount of \$350.

17 These findings and recommendations are submitted to the district judge assigned to this
18 action, pursuant to [28 U.S.C. § 636\(b\)\(1\)\(B\)](#). Within fifteen (15) court days of service of this
19 recommendation, any party may file written objections to these findings and recommendation with
20 the Court and serve a copy on all parties. Such a document should be captioned "Objections to
21 Magistrate Judge's Findings and Recommendation." The district judge will review the magistrate
22 judge's findings and recommendations pursuant to [28 U.S.C. § 636\(b\)\(1\)\(C\)](#). The parties are
23 advised that failure to file objections within the specified time may waive the right to appeal the
24 district judge's order. [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir. 1991\)](#).

25 IT IS SO ORDERED.

26 Dated: June 26, 2009

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE